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No. 268

Supreme Court of the United States

October Term, 1959

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

INDEX

CITATIONS

CASES

No. 788

IN THE

Supreme Court of the United States

October Term, 1959

SAM FOX PUBLISHING COMPANY, INC., ET AL.,

Appellants

—v.—

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

Defendant-appellee American Society of Composers, Authors and Publishers moves pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States (i) to dismiss the appeal sought to be prosecuted by Sam Fox Publishing Company, Inc., et al., from the order of the United States District Court for the Southern District of New York denying appellants' motion to intervene in this action as this Court has no jurisdiction to entertain the appeal, or (ii) that the order of the District Court be affirmed.

Statement

The detailed facts are set forth in the statement of appellee, the United States, in its motion to dismiss or affirm.

Appellee, American Society of Composers, Authors and Publishers (hereinafter "ASCAP" or "the Society"), is an unincorporated association of approximately 6,400 composers, authors and publishers of musical compositions. The members grant to the Society a non-exclusive right to license the public performance of their music, the resulting license fees being distributed among its members.

Appellants, four of the publisher members of the Society, have appealed from an order denying their motion to intervene in the District Court in connection with the entry of a consent further amended final judgment (hereinafter "the final judgment") against the Society in an action brought by the United States under Section 4 of the Sherman Act. Appellants were not parties to either the original 1941 consent judgment or the 1950 amended consent judgment, both of which were solely against the Society as a jural entity (R. 37-47a, 106-124).

Appellants have not appealed from the final judgment entered in the District Court. They agreed in the District Court that the question before Chief Judge Ryan was either to approve or to disapprove the judgment which had been submitted on consent of the parties, *i.e.*, the plaintiff the United States and the defendant Society (R. 446). Appellants sought intervention as a means of compelling the parties to agree upon a different judgment from the one to which they had consented. The method suggested by appellants for forcing such agreement was to have the Court

indicate in an opinion that some different judgment should be entered (R. 448). Judge Ryan pointed out that he could not compel either party to consent to a judgment different from the one presented on consent (R. 446), and that he could not do so "indirectly, without hearing evidence" (R. 467).

Although their motion to intervene was denied, appellants were heard at length in the District Court as *amici curiae* (R. 303-306, 434-518, 660-667). Their counsel made no objection to some of the provisions of the proposed final judgment and, as to those to which he objected, he agreed that they represented improvements over the 1950 judgment (R. 450, 474, 495, and 508). Thus, appellants could not have been prejudiced by the final judgment.

After two days of hearings, Judge Ryan directed that a vote of the membership be taken on the proposed final judgment (R. 653, 659-660, 665). In secret balloting conducted under the supervision of the District Court, the members voted overwhelmingly to approve the judgment, by a vote of approximately 83% of the total number of eligible votes on a weighted basis* and 67% of all votes cast on a *per capita* basis (R. 676, 1154). Moreover, Judge Ryan ordered that the votes on a *per capita* basis be tabulated by groups of members according to their relative income from the Society (R. 1013-1014) and, in each group of writer and

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* Under the Articles of Association, as amended upon the entry of the 1950 judgment, each writer member had one vote for every $20 received by him from the Society in the prior fiscal year, and each publisher member had one vote for every $500 of such receipts. Total writer votes were then given a weight of 50% and total publisher votes were given a weight of 50% in determining the outcome of the voting.

publisher members, a clear majority of those voting voted in favor of the judgment (R. 676, 1154).

Judge Ryan thereupon approved the final judgment on January 7, 1960, stating in his opinion:

> "The proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members. It is also the belief of the Antitrust Division that the decree is the best that today can be devised and framed; it recommends approval by the Court without qualification.
>
> "After careful consideration by the Court of the arguments for and against the approval of this proposed consent judgment, the Court finds that although not a panacea for all the alleged ills besetting the Society, the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decree." (R. 1198-1199)

The final judgment was entered on January 7, 1960 (R. 816-872). On January 14, 1960 appellants appealed from the order denying intervention (R. 877-882). They did not appeal from the final judgment itself, and in their statement of the questions presented, as set forth in their notice of appeal (R. 879-880) and jurisdictional statement (J. St. 3-4), appellants make no claim that the final judgment adversely affected them.

ARGUMENT

The appeal should be dismissed because:

1. Not having appealed from the final judgment, appellants cannot invoke the jurisdiction of this Court to review the denial of their motion to intervene.

2. In any event, intervention was properly denied.

3. No substantial question is raised by appellants.

1. The Expediting Act Does Not Confer Jurisdiction On This Court Over This Appeal

In attempting to appeal to this Court from the order of the District Court denying their motion to intervene, appellants rely on the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U.S.C. §29 (1952), as conferring jurisdiction. This statute provides:

> "In every civil action brought in any district court in the United States under any of said acts,* wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

In providing for appeal only from final judgments and only to this Court, "Congress limited the right of review to an appeal from the decree which disposed of all matters . . . and it precluded the possibility of an appeal to either Court [this Court or a Court of Appeals] from an inter-

* The reference includes Section 4 of the Sherman Act.

locutory decree" (*United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558 [1929]) such as "denial of a motion for leave to intervene" (*id.* at 559).

An appeal under the Expediting Act must be taken from the final judgment; an appeal does not lie solely from an order denying intervention. See *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142 (1944), which is discussed in the motion of appellee the United States. The final judgment in the present case was the consent further amended final judgment of January 7, 1960. Appellants are not appealing from the final judgment. The interlocutory order denying intervention, which alone is being appealed, was not "the final judgment" specified by the Expediting Act.

Of the cases cited by appellants to support jurisdiction, only *Sutphen Estates* v. *United States*, 342 U. S. 19 (1951), involved the Expediting Act. In that case, unlike the present one, the appeal was from both the final judgment and the order denying intervention and, also unlike the present case, the purpose of the attempted intervention was to object to the final judgment which the intervenors alleged would infringe their rights.*

In June 1959, the proposed final judgment was presented to Judge Ryan; hearings were held on October 19 and 20, 1959, when they were adjourned to January 6, 1960, to permit the members of the Society to vote on the proposed judgment (R. 641). On November 16, 1959 the Court below entered its order denying appellants' motion to inter-

* Even though the appeal in *Sutphen* was from the final judgment as well as the order denying intervention, the appeal was dismissed because intervention had been properly denied.

vene (R. 989-991). On January 7, 1960 appellants renewed their motion which was again denied (R. 782). Although the final judgment had been entered on January 7, 1960, appellants, in their notice of appeal filed on January 14, 1960, appealed only from the November 16, 1959 order denying intervention.

Failure to appeal from the final judgment is no oversight. Appellants' failure to appeal from the final judgment is consistent with the nature and purpose of their attempted intervention as set forth below at pages 11 to 15.

Appellants conceded in the District Court that the only provisions of the judgment of January 7, 1960 to which their jurisdictional statement adverts were an improvement over the previous judgment of March 14, 1950 (R. 450, 474, 495). Neither appellants' jurisdictional statement nor their notice of appeal purports to present for this Court's consideration any question about the final judgment of January 7, 1960. Appellants do not claim to have been injured by the final judgment. Thus, appellants do not urge a review of any action taken by the District Court except its refusal to accord appellants the status of intervenors. That, of itself, is not appealable under the Expediting Act.

Moreover, the only question before the District Court when appellants sought intervention has been finally disposed of by the entry of the final judgment, from which no appeal has been taken; indeed, the time to appeal from that judgment has now expired. Thus, in any event, the question of intervention has become moot.

2. Intervention Was Properly Denied

Appellants predicate their claimed right of intervention solely upon Rule 24(a)(2) of the Federal Rules of Civil Procedure which requires both that "the representation of the applicant's interest by existing parties is or may be inadequate" and that "the applicant is or may be bound by a judgment in the action." The question of the adequacy of the representation of appellants' interest by the plaintiff, the United States, and the question whether appellants are or may be bound by a judgment in the action, are covered in the motion of the United States. We shall confine our discussion to the adequacy of defendant's representation of appellants' interests as members of the Society.

Judge Ryan found that appellants are members of and are represented by the Society with their consent (R. 990). He also took great pains to ascertain and ensure that the Society, acting through its Board of Directors, adequately represented the Society's membership. To that end, Judge Ryan carefully devised procedures whereby the members had full opportunity to review the proposed judgment, to study the arguments pro and con, and to vote on the question whether it should be approved. Judge Ryan did not enter the judgment until he had satisfied himself that it had been approved by a majority of the votes cast in each class of the Society's membership.

When presented with the proposed final judgment on consent of both of the parties, the Court on June 29, 1959 ordered that a copy of the judgment be sent to each of the members, together with a notice of a hearing on October 19, 1959 at which all members opposing the judgment would

be given adequate opportunity to present their views to the Court (R. 48). During this period, membership meetings were held in New York and Los Angeles to discuss the proposed judgment and to answer any questions of the members, and the Society and the Department of Justice answered numerous written questions from members (R. 125-142, 956-985).

At the Court hearing on October 19 and 20, 1959, the approximately 230 members who so desired (including appellants) were allowed by the Court to express at length, either *pro se* or through counsel, their views as *amici curiae* (R. 297-675). These members expressed views ranging from opposition to the proposed judgment because of a preference for the status quo (*e.g.*, R. 521-527, 546-549; see also R. 1117, 1118) to opposition to the proposed judgment because various provisions were not those desired by the particular member (*e.g.*, R. 434-518, 528-545, 581-585; see also R. 1120-1121, 1124-1126).

The hearings were then adjourned to January 6, 1960 to permit a vote by the membership (R. 641). In connection with the voting, those members who wished to express their views of the proposed final judgment to the membership by mail were afforded full opportunity to do so; literature was sent by various members and groups of members to other members (R. 1113-1151) and, at the suggestion of counsel for appellants (R. 660-662), the Society paid $1,000 toward the mailing of literature by appellants and others who were urging a vote against the judgment. During this period, further membership meetings were held to discuss the judgment (R. 995-997).

The vote of the membership was contemplated in the proposed final judgment when it was first presented to Judge Ryan in June 1959. Certain amendments to the Society's Articles of Association were required before the Society could finally consent to the judgment and provision was made in Section VII thereof that it would not become effective unless the consent of the membership was obtained (R. 86).

As counsel for appellants recognized, this consent had to be obtained by a vote of the entire membership and not by the vote of the Board of Directors or any other group within the membership (R. 443).

Judge Ryan directed that a vote be taken, prior to his approval of the proposed judgment, to ascertain whether the membership approved the entire judgment (R. 641). Appellants expressly endorsed this procedure (R. 650). The vote was taken by mail under procedures specifically designed by the Court to safeguard the secrecy of the ballot and to ensure the impartiality of tabulation (R. 676; 1010-1014; 1068-1186).

After the ballots were tabulated in open court on January 6, 1960, under the supervision of Judge Ryan (R. 708-752), it became plain that appellants' interests as members of the Society had been adequately represented. The Court had ordered that the votes be tabulated both on a weighted basis and a *per capita* basis, as well as by classes of members (R. 1013-1014). On the weighted vote, over 80% of the votes cast were in favor of the judgment. On a *per capita* basis, 70% of the writer members voting, and 60% of the publisher members voting, voted in favor of approval of the judgment. Moreover, a majority of the votes cast in

each of the eight classes of writer members and each of the six classes of publisher members (classified on the basis of the amounts they received through the Society in 1958) were in favor of the judgment on a *per capita* basis (R. 676, 1154).

Thus, although appellants purportedly seek to protect the "smaller members" of the Society (J. St. 30), whose interests they assert were not adequately represented, a majority of the smaller members voting were in favor of the judgment.

After the vote had been tabulated, appellants suggested to the Court that the parties renegotiate the provisions of the consent judgment, arguing that "the most you would lose by that mode of conduct is that [they] will just report back to you further that nothing could be done" (R. 774). Appellants conceded, however,

> "Certainly you will never get unanimity . . . and no one will ever expect that all of the members of the Society will agree." (R. 779)

Judge Ryan observed:

> "The second observation is this. That you are dividing approximately 24 or 25 million or 26 million. —I don't know how much it is; it goes up each year—among 6,000 people, six thousand-odd people, writers, publishers, individuals, estates and corporations, widows and orphans, and those who are otherwise situated.
>
> "Now when you divide that amount of money amongst that number of people, human nature is such that you are not going to get any extent of

> unanimity of opinion because few men are content with what they receive in this life, even though their neighbors may feel they are getting far more than they ever either earned or deserved.
>
> "Now I am surprised that there is such a large number who have consented, because it shows that even balancing their own selfish interests against the proposed plan, they have determined, 'Well, perhaps this isn't as much as we should get, but we think it is fair.' " (R. 776)

Appellants thereupon renewed their motion to intervene, and it was again denied (R. 782-783).

It is submitted that, in light of the free and full opportunity provided all members to inform themselves and each other concerning the proposed judgment and in light of the vote of approval by every class of members, there can be no question but that the interest of all members in the Society as members was adequately represented.

Notwithstanding the fact that appellants had no right to be heard as parties or in any other capacity, Judge Ryan gave them ample opportunity to be heard as *amici curiae*. During the course of the hearing, counsel for appellants was questioned by Judge Ryan on the three provisions of the judgment to which appellants refer in this Court. Counsel conceded that each of these three provisions was an improvement over the corresponding provision of the 1950 judgment (R. 450, 474, 495).

Counsel for appellants conceded that Section II, providing for a scientific survey of performances on which to base the distribution of royalties, was an improvement (R. 474).

His complaint was that the judgment does not require (although it does not forbid) the survey to be conducted precisely as appellants desired. However, the judgment provides that the plaintiff, after 18 months, may seek additional relief with respect to the survey (R. 819), and the District Court has appointed two qualified independent persons, former New York Supreme Court Justice John E. McGeehan and former United States Senator Irving M. Ives, periodically to examine the design and conduct of the survey, to make estimates of its accuracy, and to report thereon to the Court and the parties (R. 1189-1190).

Counsel for appellants conceded that Section III(F) was an improvement (R. 495), even though the judgment does not require the Society to assign to the various types of music performances the exact weights which appellants desire instead of those approved by the members. However, the judgment gives the Society latitude in this respect (R. 845).

Counsel for appellants conceded that the new voting formula provided by Section IV represented an improvement over the one then in effect (R. 450). The new voting formula had been overwhelmingly adopted, in the election supervised by Judge Ryan, as an amendment to the Society's Articles of Association and—being consistent with the 1950 judgment—became effective irrespective of the entry of the final judgment of January 7, 1969. It not only reduces substantially the number of votes any single member can have but it also permits any group representing 1/12th of the votes held by either the writer or publisher members to nominate and elect a director by petition.

Appellants' "Statement of Questions Presented" characterizes the attempted intervention as being "for the purpose of urging changes in the proposed modification of the judgment", but significantly does not assert that appellants were injured by the judgment (J. St. 4). Thus, the attempted intervention asserts no justiciable claim or defense.

Intervention is the procedural device

> "whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented." 4 *Moore, Federal Practice*, par. 24.02.

Appellants cannot claim a right to intervene on the assertion that this is a class action and that they are members of the defendant class. This is not a class action* and appellants did not seek to intervene on the side of the defendant in order to interpose any defense on its behalf. In urging amendments to which the Society would not consent, appellants were "urging", if anything, a claim on behalf of the plaintiff. However, in an antitrust action brought by the Government, mandatory intervention is not available, over the Government's objection, to urge an antitrust claim on behalf of the United States; nor may appel-

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* The action is against the Society as a jural entity and the judgment runs only against it. See Federal Rule of Civil Procedure 17(b); Sherman Act §8, 15 U.S.C. §7 (1952); Clayton Act §1, 15 U.S.C. §12 (1952); *Brown v. United States*, 276 U. S. 134 (1928); *United Mineworkers v. Coronado Coal Co.*, 259 U. S. 344 (1922); *Sperry Products, Inc. v. Association of American R.R.*, 132 F. 2d 408 (2d Cir. 1942).

lants, claiming to be members of a defendant class, intervene to assert claims against the class.

Since intervention was thus properly denied, the present appeal must be dismissed. See *Sutphen Estates* v. *United States*, 342 U. S. 19 (1951); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137 (1944).

3. No Substantial Question is Presented by the Appellants

The Expediting Act does not confer jurisdiction over this attempted appeal.

The question before the District Court has been finally decided by the entry of a final judgment after the majority of the members had voted to approve the judgment and had adopted the necessary amendments to the Society's Articles of Association. The question of intervention has therefore become moot.

In any event, intervention was properly denied.

Appellants raise no substantial question in this Court.

CONCLUSION

If is respectfully submitted that the motion of appellee, American Society of Composers, Authors and Publishers, to dismiss the within appeal, or to affirm, should be granted.

Respectfully submitted,

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